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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 SONOS, INC.,

19 Plaintiff and Counter-
Defendant,

20 vs.

21 GOOGLE LLC,

22 Defendant and Counter-
Claimant.

23 Case No. 3:20-cv-06754-WHA
Related to Case No. 3:21-cv-07559-WHA

24 **GOOGLE LLC'S MOTION IN LIMINE
NO. 2 TO EXCLUDE PORTIONS OF
THE EXPERT REPORT AND CERTAIN
TESTIMONY OF MR. JAMES
MALACKOWSKI REGARDING
DAMAGES**

25 Date: May 3, 2023
26 Time: 12:00 p.m.
27 Location: Courtroom 12, 9th Floor
28 Judge: Hon. William Alsup

1 This motion *in limine* addresses certain aspects of Mr. James Malackowski's Market
 2 Approach damages theory for U.S. Patent Nos. 10,848,885 (the "'885 patent") 10,469,966 (the
 3 "'966 patent").

4 **I. INTRODUCTION**

5 *First*, Mr. Malackowski assumes that Sonos would adopt the role of an "app developer"
 6 during the hypothetical negotiation, and that the parties would agree to a "70%/30% revenue sharing
 7 split" based on the service fee that Google charges app developers whose apps are made available
 8 for download on the Google Play Store. But there is no basis for this approach, as a hypothetical
 9 negotiation between an app store and an app developer is fundamentally different than one between
 10 a patent licensor and licensee. Nor is there evidence that Sonos has ever assumed the role of an app
 11 developer during a patent license negotiation, or that either party has ever looked to Google's Play
 12 Store fee structure as a comparable data point for any patent license. Mr. Malackowski's revenue
 13 split is insufficiently tied to the facts of the case and just as arbitrary as the "25 percent rule of
 14 thumb" that the Federal Circuit rejected in *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed.
 15 Cir. 2011).

16 *Second*, Mr. Malackowski's damages calculations should be excluded because they are not
 17 proper expert opinion. For the '885 and '966 patents, Mr. Malackowski uses the subscription price
 18 of IFTTT as a starting point and makes four adjustments. But the inputs for Mr. Malackowski's
 19 calculations are based on evidence in the case that can speak for itself, or publicly-available data
 20 that Mr. Malackowski neither derived nor calculated himself. Mr. Malackowski's opinions do not
 21 offer anything that a lay juror cannot understand.

22 **II. STATEMENT OF THE ISSUES TO BE DECIDED**

23 Should Mr. Malackowski's opinions regarding the '885 and '966 patents be excluded
 24 because (1) his arbitrary 70/30 revenue split is not sufficiently connected to the facts of the case
 25 and/or because (2) they are not proper expert opinion?

26 **III. STATEMENT OF RELEVANT FACTS**

27 First, in connection with his damages theory for the '885 and '966 patents, Mr. Malackowski
 28 assumes Sonos would position itself as an "app developer who wishes to provide its technology for

1 a fee.” Ex. 1 (Mal Rep.) at 119-120. Based on this, Mr. Malackowski opines that the parties would
 2 look to Google’s Play Store fee structure as a comparable data point and agree to share revenues on
 3 a 70/30 basis, as Google does with developers who place apps for download and/or purchase in the
 4 Google Play Store (which operates for Android devices much as Apple’s App Store operates for
 5 iOS devices). *Id.*¹ Mr. Malackowski is not aware of Sonos ever assuming the role of an app
 6 developer in a patent license negotiation (Ex. 2 at 258:11-259:4), nor is he aware of either side
 7 looking to Google’s Play Store developer agreement as a comparable data point in a patent licensing
 8 negotiation. Ex. 3 at 156:25-157:19; Ex. 2 at 270:11-20. Mr. Malackowski also does not offer any
 9 support for the notion Sonos would assume the role of an app developer in a patent license
 10 negotiation, or that Google would assume the role of an app store provider. Needless to say, Mr.
 11 Malackowski has no evidence of Google ever agreeing to a 70/30 split in a patent license
 12 negotiation—or indeed any kind of revenue split at all. Ex. 2 at 259:7-16; 260:11-20.

13 Second, Mr. Malackowski’s damages calculations for the two patents are straightforward
 14 and based on publicly-available information or evidence in the case that can otherwise speak for
 15 itself. For the ’885 and ’966 patents, Mr. Malackowski (1) multiplies the IFTTT subscription fees
 16 by 10% to account for his opinion that only two of 20 applets available are necessary to group
 17 speakers (Ex. 1 at 86-88); (2) multiplies the discounted subscription fees by 7.4% and 8.8%,
 18 Google’s weighted average cost of capital (“WACC”) at the time of the hypothetical negotiations
 19 for the ’885 and ’966 patents (*id.* at 88-89); (3) multiplies that present value of the subscription fees
 20 by 29% to account for the percentage of households with more than one speaker in their home (*id.*
 21 at 89-90); and (4) reduces the resulting number by 30% to account for the 70/30 revenue split
 22 described above (*id.* at 119-121).

23 These adjustments are based on publicly-available information that Mr. Malackowski
 24 neither derived nor calculated himself. Information regarding IFTTT’s subscription fees and the
 25 number of applets one needs to group speakers is publicly available via IFTTT’s website. Ex. 1 at
 26 84-86. Mr. Malackowski obtained data on the average lifetime of a smartphone user, Google’s
 27

28 ¹ Google’s Play Store is the Android equivalent of Apple’s App Store. It is a marketplace where
 users can download applications for use on their device.

1 WACC, and the percentage of households with more than one speaker from publicly-available
 2 industry publications and news sites like Bloomberg and NPR. *Id.* at 88, n.522, 89-90, n.528.
 3 Information regarding Google's practice of charging developers on a service fee basis is publicly
 4 available via Google's website. *Id.* at 120.

5 **IV. LEGAL STANDARD**

6 An expert may offer opinions at trial only if "(1) [his] scientific, technical, or other
 7 specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in
 8 issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable
 9 principles and methods; and (4) [he] has reliably applied the principles and methods to the facts of
 10 the case." FRE 702. The party seeking to admit expert testimony bears the burden of proving its
 11 admissibility. *Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir.
 12 1996). To be admissible, opinions regarding a reasonable royalty rate must "carefully tie proof of
 13 damages to the claimed invention's footprint in the market place." *Uniloc*, 632 F.3d at 1317.

14 **V. ARGUMENT**

15 **A. Mr. Malackowski's 70/30 Revenue Split Is Not Tied To The Facts Of The
 Case.**

16 In *Uniloc*, the Federal Circuit found the "25 percent rule" to be inadmissible because it "fails
 17 to tie a reasonable royalty base to the facts of the case." *Uniloc*, 632 F.3d at 1315. Specifically, the
 18 25 percent rule is problematic because it "does not say anything about a particular hypothetical
 19 negotiation" and "would predict [] the same 25%/75% royalty split" every time, regardless of the
 20 parties or technology involved. *Id.* at 1317. Since *Uniloc*, a long line of cases has excluded similarly
 21 crude and unsubstantiated revenue and/or profit splits. *See e.g., Virnetx, Inc. v. Cisco Sys., Inc.*, 767
 22 F.3d 1308, 1334 (Fed. Cir. 2014) (rejecting damages opinion that split profits on a 50/50 basis as
 23 "insufficiently tied to the facts of the case"); *Bayer HealthCare LLC v. Baxalta Inc.*, No. 16-cv-
 24 1122-RGA, 2019 WL 330149, at *8 (D. Del. Jan. 25, 2019) (rejecting damages opinion that split
 25 incremental value associated with the patent on a 50/50 basis because the expert's analysis was
 26 "insufficient to tie the 50/50 split to the facts of the case"); *Good Tech. Corp. v. Mobileiron, Inc.*,
 27 No. 5:12-cv-05826-PSG, 2015 WL 4090431, at *7 (N.D. Cal. July 5, 2015) (excluding expert
 28

1 testimony that “fails to tie the 50/50 split to the specifics of the case”).

2 Like the splits at issue in *Uniloc* and cases that have followed, Mr. Malackowski’s 70/30
 3 revenue split is not sufficiently tied to the facts of the case. There is no basis to assume Sonos would
 4 position itself as an “app developer who wishes to provide its technology for a fee” during the
 5 hypothetical negotiation. Ex. 1 at 119-120. For starters, Sonos did not develop, and would not be
 6 providing Google with, any app for download and/or sale on the Google Play Store. In the
 7 hypothetical negotiation, Sonos would be providing Google with only a bare patent license—the
 8 software to actually practice the licensed invention would have to be developed by Google itself.
 9 But there is also no connection between Google’s Play Store agreement and the facts of this case;
 10 the agreement is not specific to Sonos, nor to the technology claimed by the ’885 or ’966 patents.
 11 Ex. 3 at 152:23-153:13; 154:2-9. There is no evidence that either party has ever used Google’s Play
 12 Store agreement in a patent license negotiation. There is no evidence that Sonos has ever positioned
 13 itself as an app developer in any patent licensing negotiation before. Ex. 2 (2023 Mal Tr.) at 258:11-
 14 259:4. There is no evidence that Google has ever discussed anything resembling a 70/30 revenue
 15 split with Sonos or another licensor. Ex. 3 at 259:7-16, 260:11-20. Finally, neither side charges a
 16 fee for the speaker grouping functionality at issue in this case, which further underscores the
 17 inapplicability of the Google Play Store’s revenue split. Ex. 3 at 122:24-123:4, 197:12-17. A
 18 negotiation between an app developer and app store is fundamentally different than the hypothetical
 19 negotiation between a patent licensor and licensee, and Mr. Malackowski does not provide any
 20 justification for his use of such a non-comparable data point in case.²

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22 ² Mr. Malackowski briefly references a “revenue sharing agreement” that Google entered into with
 23 Apple in which it supposedly “paid \$1 billion to keep search bar on the iPhone” and gave Apple
 24 34% of the revenue Google generates through each Apple device. Ex. 1 at 120. This agreement
 25 was not produced in discovery, nor does Mr. Malackowski provide a copy with his expert report.
 26 Instead Mr. Malackowski cites an article from “The Columbus Dispatch,” which apparently
 27 obtained information regarding the agreement from a hearing transcript in an unrelated copyright
 28 case. Ex. 4. Given that this is inadmissible hearsay, Mr. Malackowski should also be precluded
 from testifying about either the agreement or the article as they are irrelevant, prejudicial, and would
 only serve to confuse the jury. In fact, the article states that “[i]t wasn’t clear from the transcript
 whether that [34%] is the amount of revenue kept by Google or paid to Apple.” *Id.* at 2. See
Samuels v. Holland American Line-USA Inc., 656 F.3d 948, 952 (9th Cir. 2011) (expert testimony

1 As in *Uniloc*, Mr. Malackowski's 70/30 revenue split would predict the same royalty split
 2 in every case involving a patent negotiation between Google and a software patentee regardless of
 3 the parties, technology involved, or scope of the license (i.e., a bare patent or one that includes the
 4 actual software). Demonstrating this point, Mr. Malackowski opined that Google and Sonos would
 5 have agreed to the same 70/30 split in the hypothetical negotiations for the casting patents Sonos
 6 asserted in this case, although those patents indisputably relate to different technologies. Ex. 1 at
 7 119-120, 122-123. That Mr. Malackowski built on his 70/30 analysis using other data points that
 8 purportedly relate to the '885 and '966 patents does not redeem his analysis. As the Federal Circuit
 9 held in *Uniloc*, “[i]t is of no moment that the 25 percent rule of thumb is offered merely as a starting
 10 point to which the *Georgia-Pacific* factors are then applied to bring the rate up or down.” *Uniloc*,
 11 632 F.3d at 1317. This is because “[b]eginning from a fundamentally flawed premise and adjusting
 12 it based on legitimate considerations specific to the facts of the case nevertheless results in a
 13 fundamentally flawed conclusion.” *Id.*

14 **B. Mr. Malackowski's Analysis Is Not Proper Expert Opinion**

15 Mr. Malackowski's opinion should also be excluded because it is not proper expert opinion
 16 under FRE 702. For both the '885 and '966 patents, Mr. Malackowski's calculations are
 17 straightforward, and based on evidence in the case that can speak for itself, or publicly-available
 18 data that Mr. Malackowski neither derived nor calculated himself. *Supra* § II. Because Mr.
 19 Malackowski's analysis is nothing more than “grade-school arithmetic” based on “arguments that
 20 the lawyers can make based on other evidence in the case that can speak for itself,” his testimony is
 21 not the proper subject of expert opinion. *Waymo LLC v. Uber Techs., Inc.*, 2017 WL 6887043, at
 22 *2 (N.D. Cal. Nov. 14, 2017) (excluding damages opinion where “the evidence [the expert] relied
 23 on can speak for itself, and his only contribution would be to pile on a misleading façade of
 24 expertise]; *see also DZ Rsrv. v. Meta Platforms, Inc.*, No. 18-04978-JD, 2022 WL 912890, at *9
 25 (N.D. Cal. Mar. 29, 2022) (excluding damages opinion that did “not offer any specialized or

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 27 based on “unsupported speculation” or that is not sufficiently fact-based should be excluded as
 28 unreliable). Moreover, the article suggests that this information is highly confidential and should
 not have been disclosed. *Id.*

1 scientific expertise, or anything beyond the typical knowledge and experience of a jury” and merely
2 interpreted documents that “are reasonably intelligible to a jury without special assistance”); *Kim v.*
3 *Benihana, Inc.*, 2022 WL 1601393 (C.D. Cal. Mar. 25, 2022) (excluding expert opinion that merely
4 relied on “simple arithmetic” that was “not beyond the skill or knowledge of the common
5 layperson”).

6 **VI. CONCLUSION**

7 For the foregoing reasons, Google respectfully requests that the Court exclude the expert
8 report and testimony of Sonos’s expert James Malackowski as described herein.
9

10 DATED: April 13, 2023

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12 By _____ /s/ *Sean Pak*
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Atorneys for GOOGLE, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to the Federal Rules of Civil Procedure and Local Rule 5-1, I hereby certify that,
3 on April 13, 2023, all counsel of record who have appeared in this case are being served with a copy
4 of the foregoing via email.

5
6 */s/ Sean Pak*
7 Sean Pak
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